

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

14 This is a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in which
15 petitioner, a state prisoner, is proceeding *pro se*. Before the court is respondents' motion to dismiss
16 (docket #9), petitioner's opposition (docket #14) and respondents' reply (docket #15). The motion to
17 dismiss is based upon two grounds; lack of exhaustion of various claims and procedural default of all
18 the claims. The motion to dismiss shall be granted on the basis of procedural default.

Procedural History

20 In July of 2005, petitioner was charged with fifteen counts of lewdness with a child
21 under age 14, one count of sexual assault with a minor under 14 and one count of sexual assault with
22 a minor under 16. Exhibit 1.¹

On the 15th of February, 2006, petitioner entered into negotiated plea agreement, pleading guilty to one count of lewdness with a minor under 14 and one count of attempted sexual

²⁶ ¹ The exhibits referenced in this order were submitted by respondents in support of the motion to dismiss and are found in the court's docket at 10.

1 assault with a minor under 16. Exhibit 3. The guilty plea was later withdrawn and the case set for
 2 trial. Some sixteen months later, petitioner again agreed to plead guilty to one count lewdness with a
 3 minor under 14 and one count attempted sexual assault of a minor under 16. Exhibit 5.

4 On December 11, 2007, the clerk filed a judgment of conviction which was entered
 5 against petitioner on December 10, 2007. Exhibit 6. Petitioner was sentenced to a term of ten years
 6 to life on the lewdness count and a consecutive term of five to twenty years on the attempted sexual
 7 assault count together with a special lifetime supervision sentence and a requirement that he register
 8 as a sex offender. *Id.*

9 On December 19, 2007, petitioner filed a petition for writ of prohibition/mandamus
 10 directly with the Nevada Supreme Court. Exhibit 7. The petition sought an order requiring the trial
 11 court to hear defendant's motion to withdraw guilty plea and motion to replace counsel and to have
 12 his judgment of conviction set aside, claiming a violation of his rights to due process and equal
 13 protection under the Fourteenth Amendment. *Id.* The Nevada Supreme Court denied the petition on
 14 January 18, 2008, indicating the claims might be brought in a "timely-filed direct appeal." Exhibit 8.
 15 No such appeal had been filed.

16 A state petition for post-conviction relief was filed on July 16, 2008. Exhibit 10. The
 17 petition was denied by the trial court on December 2, 2008. Exhibit 11. A notice of appeal of the
 18 decision was filed on April 24, 2009 and that appeal was dismissed as untimely by the Nevada
 19 Supreme Court. Exhibit 13.

20 Petitioner's federal petition was signed by petitioner on or about July 24, 2009. It was
 21 received by this court on July 29, 2009 (docket #1 and #2).

22 Federal Claims

23 Petitioner raises three claims for relief in his federal petition.

24 (1) Petitioner was denied his rights under the Fifth and Fourteenth Amendments when
 25 counsel failed to "adequately consult with petitioner regarding his right to appeal the
 26 conviction and sentence. . ." causing him prejudice arising from the AEDPA's one
 year limitation period for filing a federal petition.

- 1 (2) Petitioner's rights under the Fifth, Sixth, and Fourteenth Amendments were violated
 2 when his pre-sentence motion to withdraw his guilty plea was not heard by the state
 court prior to the imposition of sentence.
- 3 (3) Petitioner was denied the effective assistance of counsel in violation of his rights
 4 under the Sixth and Fourteenth Amendments when counsel coerced petitioner to
 5 plead guilty and failed to advise the court of "withdrawal [of plea] hearing" and failed
 6 to provide petitioner with several items of "missing discovery" and failed to inform
 7 petitioner of the direct consequences of a guilty plea.

8 Petition (docket #5).

9 Procedural Default

10 Respondents contend that the petition is barred as a matter of law because the claims
 11 presented were defaulted in the Nevada Supreme Court when he failed to file a timely notice of
 12 appeal to the denial of his state post-conviction petition.

13 "Procedural default" refers to the situation where a petitioner in fact presented a claim
 14 to the state courts but the state courts disposed of the claim on procedural grounds, instead of on the
 15 merits. A federal court will not review a claim for habeas corpus relief if the decision of the state
 16 court regarding that claim rested on a state law ground that is independent of the federal question and
 17 adequate to support the judgment. *Coleman v. Thompson*, 501 U.S. 722, 730-31 (1991).

18 The *Coleman* Court stated the effect of a procedural default, as follows:

19 In all cases in which a state prisoner has defaulted his federal claims in
 20 state court pursuant to an independent and adequate state procedural
 21 rule, federal habeas review of the claims is barred unless the prisoner
 22 can demonstrate cause for the default and actual prejudice as a result of
 23 the alleged violation of federal law, or demonstrate that failure to
 24 consider the claims will result in a fundamental miscarriage of justice.

25 *Coleman*, 501 U.S. at 750; see also *Murray v. Carrier*, 477 U.S. 478, 485 (1986). The procedural
 26 default doctrine ensures that the state's interest in correcting its own mistakes is respected in all
 27 federal habeas cases. See *Koerner v. Grigas*, 328 F.3d 1039, 1046 (9th Cir. 2003).

28 To demonstrate cause for a procedural default, the petitioner must be able to "show
 29 that some *objective factor external to the defense impeded*" his efforts to comply with the state
 30 procedural rule. *Murray*, 477 U.S. at 488 (emphasis added). For cause to exist, the external

1 impediment must have prevented the petitioner from raising the claim. *See McCleskey v. Zant*, 499
 2 U.S. 467, 497 (1991).

3 With respect to the prejudice prong of cause and prejudice, the petitioner bears:
 4 the burden of showing not merely that the errors [complained of]
 5 constituted a possibility of prejudice, but that they worked to his actual
 6 and substantial disadvantage, infecting his entire [proceeding] with
 7 errors of constitutional dimension.

8 *White v. Lewis*, 874 F.2d 599, 603 (9th Cir. 1989), *citing United States v. Frady*, 456 U.S. 152, 170
 9 (1982). If the petitioner fails to show cause, the court need not consider whether the petitioner
 10 suffered actual prejudice. *Engle v. Isaac*, 456 U.S. 107, 134 n.43 (1982); *Roberts v. Arave*, 847 F.2d
 11 528, 530 n.3 (9th Cir. 1988).

12 In addition, a petitioner can avoid the application of the procedural default doctrine by
 13 demonstrating that the federal court's failure to consider his claims will result in a fundamental
 14 miscarriage of justice. To prove a "fundamental miscarriage of justice," petitioner must show that the
 15 constitutional error of which he complains "has probably resulted in the conviction of one who is
 16 actually innocent." *Bousley v. United States*, 523 U.S. 614, 623 (1998) (*citing Murray v. Carrier*, 477
 17 U.S. at 496).

18 In dismissing the appeal, the Nevada Supreme Court cited to NRS 34.575 and to
 19 *Lozada v. State*, 110 Nev. 349, 352, 871 P.2d 944, 946 (1994), which set out the period of time
 20 allowed for filing a notice of appeal in these instances and discusses the consistently applied holding
 21 that the court lacks jurisdiction in the case of an untimely filing of a notice of appeal. *Id.* Thus, the
 22 dismissal petitioner's appeal was based upon an independent and consistently applied state procedural
 23 rule.

Cause and Prejudice

24 In opposing dismissal of his petition, petitioner asserts that he was being held in
 25 administrative segregation from November 2008 until June, 2009, during the time the state district
 26 court denied his petition, and that he was unable to file a notice of appeal because the law library
 27 assistant failed or refused to bring him the proper form. He directed the court to a "previous affidavit

1 of Mays" (Opposition, p. 2), but no affidavit is found in the court's record, either attached to the
 2 petitioner or elsewhere. Petitioner was able to file a notice of appeal before his release from
 3 administrative segregation.

4 Respondents argue that petitioner has not demonstrated a cause external to the defense
 5 because of petitioner's ultimate ability to file the notice of appeal while still in segregated housing
 6 and because he offers no proof to support his assertions about the lack of cooperation from the law
 7 library.

8 The court agrees. Petitioner's arguments for cause do not demonstrate that he was
 9 prevented from filing his notice of appeal by some cause external to the defense. First, as noted, he
 10 offers no "proof" of these assertions – no affidavit from himself or others attesting to these
 11 circumstances, no copies of written requests to the law library – no actual evidence. Second, he has
 12 not shown good reason why he could not have simply drafted his own notice of appeal and submitted
 13 it for filing by U.S. mail. A notice of appeal does not require a particular form and does not require
 14 any legal citation or other research that might have involved the law library. Petitioner has not stated
 15 that he was unable to mail a document to the court while he was housed in segregation.

16 Petitioner's claims, as presented in this federal petition, have been procedurally
 17 defaulted in the state court by his failure to file a timely appeal of the district court's denial of his
 18 post-conviction habeas corpus petition. This court cannot offer him relief pursuant to *Coleman*, 501
 19 U.S. at 750. The motion to dismiss shall be granted.

20 Exhaustion

21 While respondents argue that ground three of the federal petition is different from the
 22 related ground presented to the state district court, that argument will not be entertained here, based
 23 on the preceding finding that all claims in the petitioner are procedurally barred.

24 Certificate of Appealability

25 In order to proceed with his appeal, petitioner must receive a certificate of
 26 appealability. 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9th Cir. R. 22-1; *Allen v. Ornoski*, 435

1 F.3d 946, 950-951 (9th Cir. 2006); *see also United States v. Mikels*, 236 F.3d 550, 551-52 (9th Cir.
2 2001). Generally, a petitioner must make “a substantial showing of the denial of a constitutional
3 right” to warrant a certificate of appealability. *Id.*; 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529
4 U.S. 473, 483-84 (2000). “The petitioner must demonstrate that reasonable jurists would find the
5 district court’s assessment of the constitutional claims debatable or wrong.” *Id.* (*quoting Slack*, 529
6 U.S. at 484). In order to meet this threshold inquiry, the petitioner has the burden of demonstrating
7 that the issues are debatable among jurists of reason; that a court could resolve the issues differently;
8 or that the questions are adequate to deserve encouragement to proceed further. *Id.*

9 Pursuant to the December 1, 2009 amendment to Rule 11 of the Rules Governing
10 Section 2254 and 2255 Cases, district courts are required to rule on the certificate of appealability in
11 the order disposing of a proceeding adversely to the petitioner or movant, rather than waiting for a
12 notice of appeal and request for certificate of appealability to be filed. Rule 11(a). This Court has
13 considered the issues raised by petitioner, with respect to whether they satisfy the standard for
14 issuance of a certificate of appealability, and determines that none meet that standard. The Court will
15 therefore deny petitioner a certificate of appealability.

16 **IT IS THEREFORE ORDERED** that the Motion to Dismiss (docket #9) is
17 **GRANTED**. The petition is dismissed.

18 **IT IS FURTHER ORDERED** that no Certificate of Appealability is warranted and
19 none shall issue. The Clerk shall enter judgment accordingly.

20 DATED this 26th day of August, 2010.

21 
22 Edward C. Reed.
23 UNITED STATES DISTRICT JUDGE
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